

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.	)	
	)	
Plaintiffs	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-SAJ
	)	
TYSON FOODS, INC., et al	)	
	)	
Defendants	)	

**AFFIDAVIT OF GARY MURPHY**

1. My name is Gary Murphy. I am President of Poultry Operations for Simmons Foods, Inc.

2. I have spent all of my adult life working in the poultry industry and am thoroughly familiar with grow out operation, Simmons' contracts with its independent growers and the nature of the relationship between the company and its contract growers.

3. Simmons owns no poultry grow out operations in the IRW nor does it own any chicken litter. Likewise Simmons land applies no litter.

4. Attached is a copy of our current broiler contract.

5. The relationship between Simmons and all of its growers is one of independent contract. It is so defined by agreement, by history and by fact.

6. Typically Simmons' only "contact" with a grower occurs approximately once a week for about an hour when a field service tech employed by the company physically visits the farm. The other 167 hours of the typical week the grower is alone with the birds and fully in charge of their grow out without advice from Simmons.

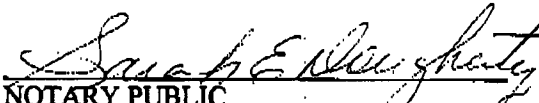
7. Simmons exercises no control over the disposition of litter which is owned by the grower and located in chicken houses owned by the grower before cleanout. Simmons does require its growers to comply with all applicable laws including the litter disposition laws of Oklahoma and Arkansas.

8. There is movement of growers between companies. For instance, approximately 160 chicken houses owned by growers who previously contracted with Simmons transferred to one of our competitors within the past year. That was a unilateral decision by those growers and Simmons had no legal right to prohibit the transfers.

  
GARY MURPHY

My Commission Expires:

8-12-2015

  
NOTARY PUBLIC

**SUBJECT TO  
PROTECTIVE ORDER**

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**SIMMONS FOODS, INC.  
BROILER AGREEMENT**

Federal ID

Grower ID

This Agreement is entered into between [REDACTED]  
[REDACTED]

(hereinafter called Grower), and Simmons Foods, Inc., Siloam Springs, Arkansas, 72761, (hereinafter called Simmons) for the purpose of growing broilers for marketable meat. Grower and Simmons agree to the following terms.

1. SIMMONS'S OBLIGATIONS - Simmons agrees:

- a. to provide Grower with chicks at no cost to Grower. Grower understands that the number of chicks provided to Grower may vary and that Simmons will retain title to them.
- b. to provide and deliver to the Grower all feed needed to grow birds to marketable age and weight. If the Grower chooses, Grower may observe the weighing of the feed. Simmons will retain title to all feed not consumed by the flock.
- c. to provide all veterinary and technical services and medication as needed for the care and treatment of the flock.
- d. to install, maintain and operate scales used in weighing poultry and feed to insure accurate weights. Simmons will employ qualified persons to operate all scales in accordance with applicable regulations.
- e. to provide Grower with true and accurate copies of chick delivery tickets, feed delivery tickets, scale tickets, condemnation report or grading certificates, and settlement sheets.

2. GROWER'S OBLIGATIONS - Grower agrees:

- a. to have the house(s) prepared as prescribed by Simmons before the chicks are delivered and to care for the flock until Simmons determines that the birds are to be moved. If all the birds cannot be moved at the same time, Grower will care for the flock until the remaining birds can be moved;
- b. to furnish all labor, housing, water, litter, fuel, spraying, utilities, and equipment as specified by Simmons for the proper care of the birds;
- c. to comply with the management instructions given by Simmons in service reports, memoranda, management tips and other communications, as may be supplied from time to time;
- d. to maintain such records as Simmons may require; such as litter disposal records, mortality charts, etc.
- e. to report promptly to Simmons any and all diseases, sicknesses, and unusual conditions that may be encountered;
- f. to provide properly maintained and adequate all-weather roads to Grower's property and around the chicken houses;
- g. to follow the Federal Insecticide, Fungicide and Rodenticide Act of 1947, as well as appropriate FDA, USDA, State, and EPA Regulations;
- h. to assist in the unloading of baby chicks. There should be enough assistance to assure each house is unloaded in approximately 20 minutes, not to exceed 30 minutes;
- i. that no other poultry, game birds, or fowl of any kind will be kept on the premises;
- j. to dispose of dead birds by sanitary and legal means;
- k. to administer no feed, vaccine or medication to the birds and use no insecticide, disinfectant, pesticide, rodenticide or chemical drug unless they are delivered or approved by Simmons
- l. to permit only those persons authorized by Simmons to enter poultry houses;
- m. that Simmons will have the right at any reasonable time to enter upon the Grower's premises to inspect the birds, premises, and records;
- n. to vaccinate the birds according to Simmons' instructions;
- o. to dispose of litter in accordance with Best Management Practices as detailed by the nutrient management plan for Grower's farm developed with appropriate governmental agencies; and to follow all applicable regulations pertaining to litter disposal; and
- p. to provide to Simmons accurate information concerning the status of the Grower's Nutrient Management Plan, the date of the latest soil

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developed with appropriate governmental agencies, and to follow all applicable regulations pertaining to litter disposal; and

- p. to provide to Simmons accurate information concerning the status of the Grower's Nutrient Management Plan, the date of the latest soil sample, the total number of birds raised annually, and the amount of litter generated annually along with the method of disposal, as more specifically set forth in Simmons' Nutrient Management Grower Checklist as provided.

3. CATCHING AND LOADING: Simmons requests that Grower be present for catching and loading and agrees to notify Grower in advance of loading date and approximate time. However, if Grower chooses not to be present, Grower agrees to accept the number smothered without contest.

4. SIMMONS' OBLIGATIONS IN COMPUTING PAYMENTS - Simmons agrees to compute grower payments in the following manner:

- a. All flocks with an average live weight below 5.00 pounds that have completed movement within a single calendar week will be settled together. These flocks will be ranked in the small bird Prime Cost Comparison. All flocks with an average live weight of 5.00 or above will be settled in the large bird Prime Cost Comparison. The large birds will be settled every two weeks. All flocks will have a prime cost per good pound determined according to Sections d and e below. All flocks will be grouped according to the applicable size category for their particular settlement time period and listed in order from the grower with the lowest prime cost to the grower with the highest prime cost. From these lists a middle grower for each group will be determined. Company operated farms, growers who are members of the board of directors, an administrative or management employee in Simmons organizational structure, or a field service representative will be settled with all growers for the purposes of determining those growers pay, then removed and a new ranking is established to determine the pay of all other growers. If Simmons becomes aware that a grower is the spouse, parent, child, or sibling of a person in one of those positions, the related grower will also be removed for settlement of the other growers. In effect, rankings for grower pay are calculated twice. The first ranking with all growers, which includes persons affiliated with Simmons then these affiliated growers are removed from the ranking and a new ranking is established to determine the pay of the rest of the growers for the settlement week.
- b. Average live weight will be determined by dividing gross live weight by head count from grower mortality sheets.
- c. The middle grower will be that flock or halfway point between two flocks at which there are an equal number of growers above and below, according to Prime Cost for each applicable weight range.
- d. Good pounds will be calculated by obtaining total live weight on Simmons' scale minus the pounds condemned due to field causes as determined from the inspection report. Condemned categories charged to field causes include tuberculosis, leukosis, septicaemia and toxemia, synovitis, tumors, airsacculitis, inflammatory process, and bruises. The pounds of field caused condemnation will be the number of whole carcass condemnations times the average live weight of the flock plus one-half (½) of the pounds of parts condemned multiplied by 1.43. Payment will be made on Good Pounds produced, multiplied by the rate per pound. Simmons shall be responsible for condemnations due to plant errors.
- e. Pounds will be added to Simmons' scale weights based on fuel used on the trip to the grower farm. The pounds used will be two (2) pounds per mile per each load.
- f. Settlements will be made before the close of the fifteenth day following the week in which the poultry is slaughtered.
- g. The Grower agrees to accept as compensation for this Agreement and the Company agrees to pay as compensation to the Grower an amount determined by the following provisions:
  1. The middle grower will be paid \_\_\_\_\_ per Good Pound.
  2. Growers with Prime Costs more than the middle grower will be paid \_\_\_\_\_ per Good Pound less the difference between the Prime Cost per Good Pound of their flock and the Prime Cost per Good Pound of the middle grower. Minimum payment is addressed in attached Addendum A.
  3. Growers with Prime Costs less than the middle grower will be paid \_\_\_\_\_ per Good Pound plus the difference between the Prime Cost per Good Pound of their flock and the Prime Cost per Good pound of the middle grower.
  4. Prime Cost per pound is determined by including total feed consumed : \_\_\_\_\_ per pound, total chicks placed \_\_\_\_\_ per chick, and standard cost of medication and vaccine (unless specified by Simmons to be used in "programmed" medication), divided by good Pounds produced.
  5. As addressed before, Middle pay for all Growers will be \_\_\_\_\_ Good Pound. Other pay will vary depending on the housing /equipment specifications that the farm has met. The proper Addendum is attached to this Agreement.

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5. REMOVAL OF BIRDS AND OTHER PRODUCTS: Right of removal of all birds, feed, medications and supplies furnished Grower by Simmons remains with Simmons. Grower agrees that no birds, feed, medication, or supplies will be removed from the premises or otherwise disposed of except as provided in this Agreement.

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6. REPOSSESSION BY SIMMONS: Simmons will be entitled to take immediate possession of the birds if at any time during the term of this Agreement

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7. EXCUSE FROM PERFORMANCE: Failure of Simmons to furnish the chicks, materials, or products which Simmons is obligated to supply herein, or of Grower to furnish the service and facilities which Grower is obligated to supply or maintain, if such failure is due to Acts of God, strikes, fire, explosions, floods, or storms shall not subject the party so failing to any liability to the other party.
8. INDEPENDENT CONTRACTOR: Nothing in this Agreement shall be construed to constitute the Grower or Grower's agents and employees as Simmons' employees. Grower is an independent contractor in the performance of the obligations imposed upon him by this Agreement. Grower shall pay, hold harmless and indemnify Simmons from all applicable premiums, payments, taxes and claims imposed for Workers' Compensation Insurance, Unemployment Compensation Insurance and Social Security benefits on behalf of Grower and any other person engaged in Grower's performance of this Agreement.
9. ARBITRATION: Any claim, dispute or controversy (whether in contract, regulatory, tort, or otherwise, whether pre-existing, present or future and including constitutional, statutory, common law, intentional tort and equitable claims) arising from or relating to the relationship between Simmons and Grower, including those arising from or relating to this Agreement or the termination thereof (collectively "Claim"), shall be resolved by binding arbitration. A three-person arbitration panel shall conduct the arbitration. Simmons and Grower shall each appoint an arbitrator to the panel. Simmons and Grower shall mutually agree upon the third arbitrator. If no agreement is reached, the third arbitrator shall be appointed by mutual agreement of the other two arbitrators. The arbitrators shall conduct the arbitration pursuant to the arbitration rules and guidelines of the American Arbitration Association to the extent any procedure is not addressed by this Arbitration Clause or is not mutually agreed to in writing by Simmons and Grower. The arbitrators may only decide the claims between Grower and Simmons and may not consolidate or join the claims of other persons who may have similar claims. The arbitrators shall not have the authority to award punitive or exemplary damages, whether in tort, contract or otherwise to either party. In reaching their award or decision, the arbitrators shall have no authority to change any provision of this Agreement. Unless inconsistent with applicable law, each party shall bear the expense of their respective attorneys', experts' and witness fees, and other costs associated with the arbitration regardless of which party prevails in the arbitration. This arbitration agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act ("FAA"). The arbitrator shall apply applicable substantive law consistent with the FAA and applicable statutes of limitations and shall honor claims of privilege recognized at law. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. This Arbitration Provision shall survive the termination or expiration of this Agreement. If any portion of this Arbitration Provision is deemed invalid or unenforceable under the FAA, it should not invalidate the remaining portions of this Arbitration Provisions.
10. DURATION: This Agreement is a "flock to flock" agreement. Its duration is for one flock of birds. However, if Simmons chooses to place and Grower chooses to accept any additional flock(s) of birds, the terms and conditions of this Agreement shall apply to the subsequent flock(s). Notwithstanding the foregoing, if a longer duration is expressly stated in an Addendum attached hereto, that duration stated in the Addendum applies. Once the duration stated in the Addendum expires, this Agreement reverts back to a "flock to flock" agreement.
11. CONDITIONS FOR TERMINATION:
  - (a) Without cause. Either party may terminate this Agreement for any reason by giving notice to the other. Such notice will be effective when the broilers being cared for are picked up, or if broilers are not currently being cared for, the notice will be effective when given.
  - (b) With cause.
    - (1) Either party may terminate this Agreement if the other party breaches any of the terms or conditions contained in it;
    - (2) Simmons may terminate this Agreement if the health or safety of the flock is in jeopardy due to improper housing, feeding, watering, medicating, vaccinating or other care of the flock;
    - (3) Simmons may terminate this Agreement if Grower, Grower's agent or employee commits acts or threats of violence against Simmons' representatives, or
    - (4) Simmons may terminate this Agreement if Grower fails to maintain the premises or equipment, including but not limited to electrical transmission lines, ladders, bins, and housing, in a manner that protects the safety of Simmons' representatives.
12. ASSIGNMENT: Grower will not assign this Agreement or in any way encumber the birds or supplies covered by this Agreement.
13. FARM SALE: If Grower chooses to sell the farm where birds are placed under this Agreement, Simmons' obligations will cease after Grower's last flock has settled. Simmons has no duty to place birds with a purchaser of Grower's farm or houses. If a purchaser desires to grow broilers with Simmons, a new contract may then be arranged with the purchaser for future placements, contingent upon Simmons' approval of conditions of the houses, equipment and proof of possession of the farm.
14. BINDING EFFECT: This Agreement and all of the provisions hereof shall inure to the benefit of and be binding upon the parties hereto, their heirs, executors, administrators, and successors.
15. NON-WAIVER: Failure to terminate this Agreement when any of the conditions contained in Section 11(b) exist shall not constitute a waiver by either party of the right to subsequently terminate this Agreement.

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16. SEVERABILITY: If any part of this Agreement is held by a court of competent jurisdiction to be void or unenforceable, the remaining provisions will continue in full force and effect.
17. ENTIRE AGREEMENT: THIS AGREEMENT, ALONG WITH ANY SCHEDULES OR ADDENDA, CONSTITUTES THE ENTIRE AGREEMENT BETWEEN THE PARTIES AND SUPERSEDES ANY PREVIOUS AGREEMENTS. NO REPRESENTATION OR STATEMENT MADE BY EITHER PARTY NOT CONTAINED HEREIN SHALL BE BINDING ON THE OTHER. GROWER AGREES THAT STATEMENTS MADE BY SIMMONS' FIELD SERVICE TECHNICIANS OR OTHER REPRESENTATIVES CONTRARY TO THIS AGREEMENT ARE NOT ENFORCEABLE AND THIS AGREEMENT CAN ONLY BE MODIFIED BY A WRITTEN INSTRUMENT SIGNED BY GROWER AND AN AUTHORIZED REPRESENTATIVE OF SIMMONS. GROWER UNDERSTANDS THAT NO REPRESENTATIVE OF SIMMONS HAS THE AUTHORITY TO MAKE AN ORAL AGREEMENT FOR SUCCESSIVE FLOCKS OR ANY OTHER ORAL MODIFICATION OF THIS AGREEMENT.

IN WITNESS WHEREOF, the parties thereto have caused this Agreement to be executed this 11 day of May, 2004.

SIMMONS FOODS, INC.

By: 

GROWER(S)

By: 

By: \_\_\_\_\_

Revision date 5/04/04

**SUBJECT TO  
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**CERTIFICATE OF SERVICE**

I hereby certify that on 13<sup>th</sup> day of February, 2008, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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and I hereby certify that I have mailed the document by the United States Postal Service to the following non CM/ECF participants:

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